Maritime Board prior to the District Court. The Board, as intervenor, joined in this motion. The District Court denied the motion. "This Court granted certiorari ... under §262 of the Judicial Code, 28 U. S. C. §1651(a), because there are in issue important questions regarding the relation between the Sherman Law and the Shipping Act."

This Court cited United States Navigation Company v. Cunard Steamship Company, 284 U.S. 474, 485 (1932):

> "The [Shipping] act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect to others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts particular to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. ...
>
> The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are

demonstrative of this conclusion."

This Court concluded that initial submission to the Federal Maritime Board was required and that the District Court case should be dismissed reversing that court's judgment.

According to Far East Conference, supra, §262 of the Judicial Code and 28 U.S.C. §1651(a) were equated and used to resolve important questions regarding the relation between the Sherman Law and the Shipping Act. Campbell, supra, presents important questions a) regarding the relation between the 7th Amendment to the United States Constitution and a common law of Contributory Negligence; and b) where state courts of last resort in Maryland and West Virginia have decided nearly identical cases in conflict, what is "equal justice under law?"

In De Beers Consolidated Mines, Limited et al. v. United States, 325 U.S. 212 (1945), the United States filed a complaint in District Court seeking equitable relief and a preliminary injunction that restrained withdrawal of defendants' assets from the country prior to the determination of the issues in the case. The decree granting the injunction was brought before this Court via §262 of the Judicial Code which this Court reversed since only equitable relief was permitted under the Sherman and Wilson Tariff Acts by the District Court. That court did not have jurisdiction to enter a money judgment yet financial assets were the main concern of the injunction. "But when a court has no judicial power to do what it purports to do - when its action is not mere error but usurpation of power - the situation falls precisely within the allowable use of §262 [of the Judicial Code]."

APPENDIX UU

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

August 11, 2005

Gregory S. Mercer
3114 Borge Street
Oakton, VA 22124

RE: Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company

Dear Mr. Mercer:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case was originally received August 1, 2005 and received again August 10, 2005. The papers are returned for the reasons stated in the August 3, 2005 correspondence. It appears that you were not a party to the case in the Court of Appeals of Maryland (No. 490, September Term, 2004).

Sincerely,
William K. Suter, Clerk
By:

s/ Jeffrey Atkins

Jeffrey Atkins
(202)-479-3263

Enclosures

APPENDIX VV

No. 04-1676

IN THE SUPREME COURT OF THE
UNITED STATES

GREGORY SHAWN MERCER, Petitioner v.

WILLIAM ALOYSIOUS THOMAS, III, et al.,
Respondents

On Petition for Writ of Certiorari
to the Court of Appeals of Maryland

MOTION TO PUT PETITION ON DOCKET

In re GREGORY SHAWN MERCER, PETITIONER

GREGORY SHAWN MERCER, PRO SE
Counsel of Record
3114 Borge Street
Oakton, Virginia 22124
(703)-591-4662

Served: August 16, 2005

Filed & Received: August 17, 2005

COMES NOW Petitioner, Gregory Shawn Mercer, pro se, and moves this Court to put Petition "*In re* Gregory

Shawn Mercer, Petitioner" on the Docket of this Court.

Petition for Common-Law Writ of Certiorari to the Court of Appeals of Maryland, "*In re* Gregory Shawn Mercer, Petitioner," appears as Appendix TT of Petitioner's Supplemental Brief, Petition No. 04-1676, filed August 11, 2005. August 11th is the 150th day since the Petition for Rehearing (Motion for Reconsideration) was denied in Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, Petition Docket No. 490, September Term 2004 (March 14, 2005 - *Appendix W* at App. 53). Campbell missed his 90th day deadline to file a Petition (Monday, June 13, 2005) and his 30-day extension as a Respondent in Petition No. 04-1676 to file a Conditional Cross-Petition (Thursday, July 14, 2005).

Whether Respondent BG&E settled with Respondent Campbell to prevent him from filing any Petition or Respondent Campbell became disillusioned concerning continued legal efforts in this Court and simply gave up, ***this Court's appellate jurisdiction has been hampered by Campbell's failure to file a Petition.*** Petitioner searched for a jury member for an intervenor. As Petitioner searched for the jury, he discovered that neither the Maryland State Archives nor the Circuit Court for Baltimore City has 83% of the original file for Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, a body corporate, Case No. 87323051 / CL 73959 (*Appendix OO* at App. 161). Missing are all documents in the original file prior to December 20, 1991 including the December 4, 1991 Voir Dire Sheets with prospective jurors names and the December 13, 1991 Jury Verdict

Sheet signed by the Forewoman. However, the trial transcript from December 3, 1991 through December 13, 1991 has been recovered via Respondent Campbell's own records. No intervenor from the jury in accordance with the 7th Amendment to the United States Constitution was found.

Petitioner requested proof from the Court of Appeals of Maryland that September Term 2004 Petitions Nos. 434 and 490 (Gregory Shawn Mercer v. William Aloysious Thomas, III and Campbell, supra) were joined. Maryland's highest court provided Petitioner one inconclusive document (*Appendix RR* at App. 177). Petitioner checked the Court of Appeals of Maryland docket entries for Petitions Nos. 434 and 490 (See *Appendix* [*WW* at App. 198]). However, both Petitions Nos. 434 and 490 received the same judgment on the same day, December 23, 2004 (*Appendices J & V* at App. 18 & 52). Both Petitions for Rehearing (Motions for Reconsideration) in Petitions Nos. 434 and 490 were denied the same day, March 14, 2005 (*Appendices K & W* at App. 19 & 53). Petitioner needs to have been a joined party in Campbell, supra, in the Court of Appeals of Maryland to file a Petition for Common-Law Writ of Certiorari in this Court. The Court of Appeals of Maryland has made Petitioner's standing in Campbell, supra, ambiguous. Petition No. 04-1676 has the first of the Questions Presented for Review: Whether or not Maryland's highest court evaded federal claims in cases/appeals involving contributory negligence. *Petitioner alleges his ambiguous standing in Campbell, supra, in the Court of Appeals of Maryland was by the*

***design** of that court to **hamper this Court's appellate jurisdiction**.*

Supreme Court Rule 10(c) concerning Considerations Governing Review on Certiorari states:

> [A] state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Campbell, supra, presents the important federal question of whether the 7th Amendment to the United States Constitution was violated using Maryland's Contributory Negligence common law as justification making that common law unconstitutional (*Appendix M* at App. 22 - 29). Supreme Court Rule 10(b) states:

> [A] state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort ...

Campbell's Court of Appeals of Maryland Motion for Reconsideration (*Appendix KK* at App. 129, 131 - 148) compares the nearly identical cases, Supreme Court of Appeals of West Virginia's case Bradley v. Appalachian Power Company, 163 W. Va. 332, 256 S.E.2d 879 (1979) and Campbell, supra. West Virginia changed from Contributory Negligence common law to a 49% Comparative Negligence common law based on Bradley,

supra, while Maryland ruled, "denied as there has been no showing that review by certiorari is desirable and in the public interest" in Campbell, supra. *These are two powerful arguments which give this Court jurisdiction in Campbell, supra, a case in which the Court of Appeals of Maryland has already ruled and would prefer this Court not review.*

Petitioner filed an Application for Extension of Time to File a Petition for Common-Law Writ of Certiorari to the Chief and Circuit Justice Rehnquist on August 1, 2005. For **Good Cause**, Petitioner could not have known to file such a document 10 days before June 12, 2005 (the 90th day from the petition for rehearing denial) because Petitioner expected Campbell to file a Petition. Likewise for July 14, 2005 (the 30th day from Respondent Campbell being named a Respondent in Petition No. 04-1676) because Petitioner expected Respondent Campbell to file a Conditional Cross-Petition.

The **extraordinary circumstance** and point of Petitioner's "Supplemental Brief with Appendix TT: *In re* Gregory Shawn Mercer, Petitioner" which was filed August 11, 2005 (The 150th day) was to document Petitioner's efforts to get his Application for Extension of Time past the Clerk's office to the Chief and Circuit Justice Rehnquist and file the Petition for Common-Law Writ of Certiorari. This Petition attempts to bring the Campbell jury via appointed counsel before this Court as a party in order that it might defend its unanimous, December 13, 1991 verdict in accordance to the 7th Amendment. *A common-law writ of certiorari is needed to **aid this Court's appellate jurisdiction** to review*

Campbell, supra, in accordance with 28 U. S. C. § 1651(a). For whatever reason, Campbell, BG&E, a juror intervenor, or jury intervenor either will not or can not file a Petition for Writ of Certiorari. Petitioner is forced to use his standing as a joined party in Campbell, supra, to file this Petition for Common-Law Writ of Certiorari.

WHEREFORE, Petitioner moves this Court to put "*In re* Gregory Shawn Mercer, Petitioner" on this Court's Docket (**Please Note Error**: Petition for common-law writ of certiorari, page iv, Table of Authorities, Cohen v. Rubin is on page "**15**" and not page "**1**").

Respectfully submitted,

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pro se
3114 Borge Street
Oakton, Virginia 22124
(703)-591-4662

APPENDIX WW

COURT OF APPEALS OF MARYLAND

PETITION DOCKET
No. 434, September Term, 2004

GREGORY SHAWN MERCER v.

WILLIAM ALOYSIOUS THOMAS, III

Filed: October 27, 2004
F. F. Pd.

C. C. Prince George's County
Spellbring, J.
CAL0302711

CSA No. 1713, Sept. Term, 2003

Opinion filed: 7/28/04 - Unreported

Mandate issued: 10/12/04

Counsel for Petitioner: Gregory Shawn Mercer
3114 Borge Street
Oakton, Va. 22124

Counsel for Respondent: Wade J. Gallagher, Esq.
Martell, Donnelly, Grimaldi & Gallagher
9 North Adams Street
Rockville, Md. 20850

Copies to the Court: 12-2-04

Result: 12-23-04 - Petition and Supplements denied

2-3-05 - Motion for Reconsideration

3-14-05 - Motion denied

6-14-05 - Motion for Reconsideration

7-18-05 - Motion denied

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

No. 434

October 28, 2004 - Motion to correct errata in petition for writ of certiorari.

November 1, 2004 - Corrected petition for writ of certiorari second motion [to correct errata].

November 4, 2004 - Preaecipe filed.

November 12, 2004 - Answer to petition for writ of certiorari.

November 15, 2004 - Answer to Respondent's petition for writ of certiorari [sic. - Reply to

Respondent's answer to petition for writ of certiorari].

[*Correction fluid*] December 2, 2004 - Praecipe filed.

January 21, 2005 - Motion for reconsideration.
[*End correction fluid*] F. F. Pd.

June 2, 2005 - Motion for clarification, Motion for certification that Federal Questions were raised and decided.
F. F. Pd.

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

COURT OF APPEALS OF MARYLAND

PENDING

PETITION DOCKET
No. 490, September Term, 2004

ROBERT B. CAMPBELL, JR. v.

BALTIMORE GAS AND ELECTRIC COMPANY

Filed: December 2, 2004
F. F. Pd.

C. C. Baltimore City
Smith, J.
87323051

CSA No. 1932, Sept. Term, 2004

Opinion filed: PENDING

Mandate issued:

Petitioner: Robert B. Campbell, Jr.
683 Windsor Drive
Westminster, Md. 21158

Counsel for Respondent: Barbara A. Gaughan, Esq.
750 East Pratt Street
17th Floor
Baltimore, Md. 21202

Copies to the Court: 12-8-04

Result: 12-23-04 - Petition denied

2-3-05 - Motion for Reconsideration

3-14-05 - Motion for Reconsideration denied

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

No. 490

December 8, 2004 - Affidavit of service

December 16, 2004 - Response to petition for writ of certiorari.

December 23, 2004 - Reply to response/answer to petition for writ of certiorari.

January 21, 2005 - Motion for reconsideration. F. F. pd.

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

APPENDIX XX

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

August 22, 2005

Gregory S. Mercer
3114 Borge Street
Oakton, VA 22124

RE: Gregory Shawn Mercer v. William Aloysious Thomas, III, et al., No: 04-1676

Dear Mr. Mercer:

The motion to put petition on docket in the above-entitled case received August 17, 2005 is herewith returned.

As stated in prior correspondence, only a party to the lower court proceedings may file a petition for a writ of certiorari in this Court. A motion to place such a petition on the docket will not be entertained by the Court.

Your $300.00 check is herewith returned.

Sincerely,
William K. Suter, Clerk
By:

s/ Jeffrey Atkins
Jeffrey Atkins
(202)-479-3263

Enclosures
cc: David F. Grimaldi
Robert B. Campbell, Jr.
Barbara A. Gaughan

APPENDIX YY

IN THE COURT OF APPEALS OF MARYLAND

Petition No. 434, September Term 2004

GREGORY SHAWN MERCER, Petitioner vs.

WILLIAM ALOYSIOUS THOMAS, III, Respondent

PRÆCIPE
(December 2, 2004)

On page 19 of the Petition for Writ of *Certiorari* (Original or Corrected Petition), Petitioner has requested this Court hear Robert B. Campbell, Jr.'s Future Petition together with Petitioner's Petition. On December 2nd, 2004, Campbell's Petition for Writ of *Certiorari* to the Court of Special Appeals of Maryland was filed in this Court. Additionally, on pages 20 and 21 of Campbell's Petition, Petitioner Campbell has requested this Court hear his Petition together with Mercer's (Petitioner herein) Petition. Hopefully the timing is such that these Petitioner requests may be honored by this Court.

Respectfully Submitted,

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pro se
3114 Borge Street
Oakton, Virginia 22124

703-591-4662
202-431-9401

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Præcipe was mailed by first class mail, postage prepaid, to Wade J. Gallagher, Esq., attorney for Respondent, Martell, Donnelly, Grimaldi & Gallagher, 9 North Adams Street, Rockville, Maryland, 20850 this 2nd day of December, 2004.

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pro se

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No. 04 - 1676

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY SHAWN MERCER,

Petitioner,

V.

WILLIAM ALOYSIOUS THOMAS, III, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR REHEARING

GREGORY S. MERCER, PRO SE
Counsel of Record
3114 Borge Street
Oakton, Virginia 22124
(703) 591-4662

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655 A.2d 401 (1995) PFR-7, 8, 9

G & H Clearing & Landscaping v. Whitworth,
66 Md. App. 348, 503 A.2d 1379 (1986) PFR-5

PETITION FOR REHEARING

Pro se Plaintiff, Appellant, Petitioner herein is a citizen of the United States of America by birth who believes in the liberties and justice conveyed by the Constitution of the United States. Petitioner is entitled to enjoy his guaranteed rights recited in the United States Constitution as amended. Specifically, those rights imbedded in the 7th and 14th Amendments. They are the 7th Amendment (right to a civil jury trial) and the 14th Amendment (right to due process and equal protection).

These two Amendments are essential to the nation at large by attempting to ensure fair and unbiased verdicts from juries composed of impartial fact finders considering grievances between adverse parties in the United States. These two Amendments protect as well as guarantee the fair administration of justice in the United States.

Amendment VII to the United States Constitution provides:

> **[Rule 33(1)(d) exclusion of 7 lines]** - In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Circuit Court for Prince George's County, Maryland (hereafter "CC") held a Motions Hearing upon Defendant Thomas' (hereafter Defendant, Appellee, and

Respondent) Motion to Dismiss the Complaint opposed by Plaintiff's Response thereto and dismissed "with prejudice" (decided July 18, 2003) Plaintiff's Original Complaint (filed February 11, 2003) in Gregory Shawn Mercer v. William Aloysious Thomas, III, CAL 03-02711 (*Appendix A* at App. 1 & *Appendix E* at App. 8). Plaintiff's Complaint contained an Election for Trial by Jury. The CC reason for dismissal was two-fold:

> a) "... [F]raud, there's nothing pled regarding reliance on any statement made to the detriment of the plaintiff."
>
> b) "... [T]he matter is filed beyond the 3-year period of limitations ... (*Appendix A* at App.2)"

Before appeal to the Court of Special Appeals of Maryland (hereafter "COSA"), Plaintiff filed a Motion to Alter or Amend a Judgment - Court Decision in the CC pleading all allegedly-fraudulent Defendant deposition and trial testimony verbatim from Complaint Exhibits 4 & 5 (*Appendix AA* at App. 75 & *Appendix BB* at App. 82). This made *correctable* a defect in Plaintiff's Original Complaint, paragraphs 12 & 13. Additionally, Plaintiff's Motion moved for leave to amend the Original Complaint. Complaint Exhibits 4 & 5 were referred to without adoption or verbatim quotation in Complaint paragraphs 12 & 13 (*Appendix X* at App 57).

Further, Plaintiff's Response to Defendant's Motion to Dismiss the Complaint (*Appendix DD* at App. 87) had pled as Plaintiff argued at the CC Motions Hearing

(*Appendix EE* at App. 90 then *Appendix A* at App. 1) that the date Plaintiff discovered Defendant's truthful insurance statement or August 7, 2002 (*Appendix Y* at App. 64) was the date the 3-year statute of limitations commenced for the fraud cause of action in Mercer v. Thomas, CAL 03-02711. A second defect in Plaintiff's Original Complaint, paragraph 19, had been made *correctable* by Plaintiff's Response to Defendant's Motion to Dismiss the Complaint (*Appendix DD* at App. 87). That defect was the date of discovery of Defendant's truthful insurance statement commenced the 3-year statute of limitations not the date of Plaintiff's accident reconstructionist expert's report (*Appendix Z* at App. 68). This was and is in accordance with the Code of Maryland, Courts and Judicial Proceedings, §5-203 which provides:

> **[Rule 33(1)(d) exclusion of 6 lines]** - If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.

Plaintiff had conducted an ordinarily diligent investigation for Defendant's truthful insurance statement (*Appendix AA*, paragraph **H3** at App. 75). Defendant's Answers (signed on May 24, 1995) continuing in nature to Interrogatories propounded to Defendant were as follows:

> 20. State whether you have within your control, or have knowledge of any transcripts of testimony in

any proceeding arising out of the occurrence and, if so, state the date, the subject matter, the name and address of the person recording said testimony.
ANSWER: None.

24. Attach to your Answers a copy of any signed or recorded statements made by this Defendant(s)* in your control, or in the control of your agents, representatives or counsel.
ANSWER: None.

*- Mercer v. Thomas, et al., CAL 94-21066 was a consolidated case which had three Defendants: Defendant Thomas, his mother Defendant Burrell, and Third-Party Defendant Lumsden.

Plaintiff's investigation for Defendant's truthful insurance statement had not been faulty. The Defendant had failed to disclose his statement as required!

The Code of Maryland, Courts and Judicial Proceedings, §5-101 provides:

> [**Rule 33(1)(d) exclusion of 5 lines**] - A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Therefore, for Mercer v. Thomas, CAL 03-02711, "another provision of the Code" in Courts §5-101 above refers to Courts §5-203.

Despite Plaintiff's insistence in CC that his Complaint was *correctable*, the CC denied his Motion to Alter or Amend ***without opining that Plaintiff had made any failure to investigate for Defendant's truthful insurance statement*** (*Appendix A* at App. 1). Denial of the Motion to Alter or Amend was likewise a denial of leave to amend Plaintiff's Complaint. "Leave to amend may, and in some instances should be extended even where pure motion to dismiss is granted." G & H Clearing & Landscaping v. Whitworth, 66 Md. App. 348, 503 A.2d 1379 (1986). **This Petitioner believes this Court may have overlooked that the CC denial of his Motion to Alter or Amend also was a denial of leave to amend a *correctable* Complaint. This was a violation of Petitioner's right as guaranteed by the 7th Amendment to the Constitution since Petitioner's Complaint contains an Election for Trial by Jury.**

On appellate review, the COSA altered the previous CC reason for dismissal of "... nothing pled regarding reliance on any statement made by the defendant ..." All allegedly-fraudulent Appellee deposition and trial testimony had been pled in Appellant's Motion to Alter or Amend filed in the CC. The new COSA reasoning for dismissal was two-fold but different from the CC reasoning:

> c) "[F]or more than three years before he filed this lawsuit, Mercer either knew, or had reason to know, or had reason to investigate whether Thomas's deposition testimony and trial statements differed from his previous statements because he was lying."

> d) "Mercer alleges that he only 'discovered [Thomas's] civil perjury and fraud on January 15, 2003, when Dr. Clyde C. Richard completed his report[.]' ... Our review of Richard's report does not reveal any discernible connection between its findings and Mercer's alleged lack of knowledge regarding the veracity of Thomas's testimony. (*Appendix H* at App. 15)."

Clearly, in the latter of the COSA reasoning, the COSA missed Appellant's Response to Appellee's Motion to Dismiss the Complaint (*Appendix DD* at App. 87) which was properly before the COSA. Case law encourages a CC judge to extend leave to amend a *correctable* Complaint. However, in the COSA there is no opportunity for an Appellant to amend his Complaint based on a new COSA reason.

> "As a result of the Court of Special Appeals *sua sponte* raising the issue of the adequacy of the pleadings, Davis was precluded from either amending his complaint to plead a legally sufficient cause of action **or from having sufficient opportunity to prepare an argument that he did adequately plead a legally sufficient cause of action**. [The portion in **bold** was inadvertently omitted from Petitioner's Petition for Writ of Certiorari, paragraph 2, page 11.] The instant case demonstrates the prejudice that is suffered by a plaintiff when an appellate court affirms a trial court's judgment based on a motion to dismiss for

> failure to state a claim upon which relief can be granted when the motion on appeal is one for summary judgment. Davis v. DiPino et al., 337 Md. 642, 654; 655 A.2d 401, 407 (1995).

The difference between the Davis v. DiPino case and the Mercer v. Thomas case is that the CC in Davis' case didn't take issue with the adequacy of Davis' Complaint so Davis never made an attempt to amend his Complaint while in the CC. Davis' need to amend his Complaint arose in the COSA after Davis was beyond the CC where he could have moved for leave to amend his Complaint. David was prejudiced.

The CC in this Plaintiff's case took issue with the adequacy of his Complaint so Plaintiff moved for leave to amend according to the reasons opined by the CC. When the COSA altered those reasons, this Appellant was prejudiced because he did not "have sufficient opportunity to prepare an argument that he did adequately plead a legally sufficient cause of action" or could amend to do so continuously from the CC and contained in the CC record. Had the CC opined that Plaintiff had failed to investigate for Defendant's truthful insurance statement or the COSA reversed and remanded the case to the CC, Plaintiff would not have been prejudiced.

With an adequate opportunity to prepare an argument, Petitioner argues that the Complaint is still *correctable*. Respondent failed to disclose the truthful insurance statement requested in Interrogatories propounded in the CC for Mercer v. Thomas, et al., CAL 94-21066. Respondent's Answer continuing in nature to

Interrogatory #24 was "None" (See PFR-4 above) as in there are no signed statements by Defendant in Defendant's control or Defendant's insurance company' s control. This was not true but made under oath. Petitioner can not be faulted for failure to investigate further despite Respondent's deposition testimony:

> "**Q** (Petitioner's attorney) - Did you give any person a recorded or written statement in connection with this accident, other than what we're doing today, obviously?
> **A** (Respondent) - I had answered some interrogatories.
> **Q** - Other than those interrogatories, which I'm sure counsel here helped you prepare, and which you answered, did you give a police officer a written statement? Did you speak with any insurance company and give them a written or recoded statement, or anything like that?
> **A** - I know I didn't give the police officer a written statement. And as far as the insurance company, I honestly cannot remember if I did, but I would assume that I did (*Appendix AA* at App. 76)."

Davis v. DiPino concluded with the COA opining the following:

> "Consistent with this Court's decisions, when an appellate court makes a determination that a trial court erred when it granted summary judgment because there was a genuine issue of material fact,

> the court should reverse and remand the case to the trial court for further proceedings. Because the plaintiff is prejudiced when an appellate court *sua sponte* raises and grants a motion to dismiss for failure to state a claim upon which relief can be granted, prohibiting an appellate court from considering that issue is consistent with this Court's refusal to consider an issue for the first time on appeal if to do so would prejudice the plaintiff. ... Thus, the Court of Special Appeals erred in affirming the circuit court's judgment in the instant case based on Davis's failure to plead any claim upon which relief can be granted, when the issue on appeal was whether the circuit court was correct in granting summary judgment for the defendants." Davis v. DiPino et al., 337 Md. 642, 656; 655 A.2d 401, 408 (1995).

This Petitioner believes this Court may have overlooked that the COSA alteration of the CC reason why Petitioner's Complaint was dismissed prejudiced Petitioner by complicating his argument that the Complaint was *correctable*. The COSA affirmation of dismissal on altered grounds was a violation of Plaintiff's right as guaranteed by the 7th Amendment to the Constitution since Plaintiff's Complaint is *correctable* and contains an Election for Trial by Jury.

Amendment XIV to the United States Constitution, section 1 provides, in pertinent part:

> **[Rule 33(1)(d) exclusion of 10 lines]** - All persons